File Ref: S400-005-006-01
Date: 22 February 2022
Memo To: **David Dew**

Copy To: **Robert Foitzik, Rhys Welbourn**

From: **Mark Wheeler**

Subject: Ferry Precinct Re-Development Questions

Thanks for your questions David. Our responses follow, which we can discuss in more detail on Wednesday afternoon. Attached is a redacted Business Case including a Risk Register.

> My main question is what legal advice and analysis has Council undertaken on the risks inherent in the deal the portco/council have done and can I see that opinion?

There has been a comprehensive risk analysis undertaken which has not been restricted to legal risk. Council initiated a risk based approach early in the discussions between Port Marlborough, MDC Holdings, Council and KiwiRail. As a result Port Marlborough have completed a comprehensive Risk Register with mitigations which MDC Holdings and Council have considered as part of the Business Case, prior to going out to consultation. The Business Case is Commercially Sensitive and Privileged but we are releasing most of its content given the concerns of some submitters including yourself. Redactions have only been made for commercial sensitivity reasons.

Several expert consultants have provided assurance to the Port in finalising its Business Case including Castalia, on economic and commercial matters, 41 South for project management, various engineering consultants, resource management and ecological experts and Bell Gully on legal matters.

The Boards of Port Marlborough and MDC Holdings are very experienced and well qualified both commercially and financially and a professional engineer with a very strong background in large civil projects joined the Port Marlborough Board in 2021.

There are several legal agreements required to give effect to the project by Port Marlborough, MDC Holdings and Council. They include Key Terms between Port Marlborough and KiwiRail (now signed), a Comprehensive Redevelopment Agreement, leases, licences and ground rentals.

Council has existing financing agreements in place with the Local Government Financing Agency, MDC Holdings and Port Marlborough and securities in place for investments Council makes. Also it is worth noting that Council's very recent Standard and Poors Global AA+ credit rating was awarded in full knowledge of the iReX project and Council's possible role.

Council has a written commitment from KiwiRail to build and fund the Dublin Street overbridge and agreement in principle to funding ⅔ of the cost to upgrade the undersize Waitohi River/Kent St Drain culverts (which is expected to be a $12m benefit).

It will be recommended to Council that if they approve the loan to fund the project it be conditional on being satisfied with all these legal agreements.

> My next question is what advice has been provided to Councillors on the potential for them to have personal liability if this loan is defaulted on. Don't forget it's well known the counter party KiwiRail is totally dependent on Crown funding even now to operate.

As you will know Councillors have a qualified privilege under the LGA 2002. They are different to Directors. Members will not be personally liable in circumstances where, although being a party to the act or failure to act, the member acted in good faith and relied on reports, statements, financial data, or other information from professional or expert advisers, namely staff or external experts on the matters. Councillors have been provided with a multitude of such advice, reports etc.

> There is no long commitment by the Crown to continue this and a change of Government could see funding cease.

Rail is now to be funded through the National Land Transport Fund which provides greater security than the current appropriations.

It was considered by Port Marlborough, MDC Holdings and Council that the Government's massive investment in rail following the Kaikōura earthquakes, in new rolling stock nationally and now for the iRex vessels and other project costs demonstrates a large commitment.

Obviously interisland freight relies on an efficient ferry service and increasingly will require an environmentally sustainable service. The iReX project achieves that with rail a key component.

So theoretically a future government could cease funding but it's hard to understand why that would occur and what the alternatives would be. This situation is very different from that which existed in Solid Energy's case. The Business Case and Risk Register provide further information.

> The Courts these days are very quick to sheet home personal liability and create new law in the process when they feel inadequate processes have lead to loss.
>
> Jenny Shipley didn't expect liability and look what happened to her.
>
> Has Council/Portco obtained any registered security by way of first charge over anything? My understanding is Westpac holds that so any deal to forfeit the ferry terminal won't trump Westpac's security.

Westpac loans are secured against the Kaitaki and Kaiarahi ($43.0m) and KiwiRail has a BNZ facility of $15m which was undrawn at 30 June 2021. A syndicated loan facility of $350m has been obtained (certified by the Climate Bond Initiative – a world first for new ships).

Council's security will rank behind BNZ and Westpac but KiwiRail Holdings balance sheet as at 30 June 2021 reports close to $1.7B of net assets(equity) which provides substantial security.

So in the event of financial failure the assets of KiwiRail should provide security to Port Marlborough and Council.

> The ships are also funded I think by lease so any default and they disappear as well.

The new vessls are not leased and will be owned by KiwiRail. Loans have been certified by the Climate Bond Initiative – a world first for new ships. Council has considered the KiwiRail project Business Case.

Yours faithfully

M. J. Wheeler.

MARK WHEELER
CHIEF EXECUTIVE